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No. 190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

FRANK CARMINE NARDONE, AUSTIN L. CALLAHAN, HUGH BROWN and ROBERT GOTTFRIED,

Defendants-Appellants,

against

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF DEFENDANT-APPELLANT FRANK CARMINE NARDONE

THOMAS O'ROURKE GALLAGHER,
Attorney for Defendant-Appellant,
Frank Carmine Nardone.

INDEX

	PAGE
Jurisdiction	1
Statement of Case	2
State of Assigned Errors Presented to This Court	3
ARGUMENT	3
I—Title 47 U. S. C. A., Section 605, prohibits the interception and/or the divulging or publication of the contents of any such intercepted communication	3
Excerpts from the Opinion of the Circuit Court	5
History of the Act	5
The Beard Case is Not Controlling	7
The Smith Case	7
The Hearst Case	8
Telegrams	13
II—The admission of a telephone conversation relative to acts of violence not connected with the issues, was prejudicial and was grounds for a mis-trial, as far as the defendant Nardone was concerned	14
III—The trial court erred in refusing to grant motion to dismiss indictment as against the defendant Nardone	17
IV—Wherefore, it is respectfully submitted that under the foregoing, judgment of conviction entered herein should be reversed, so far as same affects the defendant Nardone, the indictment dismissed and defendant discharged	18
Appendix	19

PAGE

Beard v. U. S., 82 Fed. (2d) 837 (App. D. C.) 7

Cooley's Constitutional Limitations, 8th Ed. (1927), Volume 1, on page 625 13

Dale v. U. S., 66 Fed. (2d) 666 18

Gray on Communications, etc., Sec. 25 (1885) 9

Hearst v. Black 8

Jones, Telegraph and Telephone Companies, Sec. 305 (1906) 9

Leroy v. Gov't of Canal Zone, 81 F. (2d) 914 16

Marsh v. U. S., 82 Fed. (2d) 703 16

Niccola v. U. S., 72 F. (2d) 780 18

Oras v. U. S., 67 F. (2d) 463 18

Parnell v. U. S., 64 F. (2d) 324 18

Paul v. U. S., 79 Fed. (2d) 561 17

Albert H. Smith, et al. v. United States 7, 16

U. S. v. Buchalter and Shapiro (C. C. A.), 2nd Circuit, March 8th, 1937 18

U. S. v. McClarty, 191 F. 518 18

Zito v. U. S., 64 F. (2d) 772 18

STATUTES CITED

Section 605 of the Federal Communications Commission Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605) 19

Section 501, the penal section of the statute (48 Stat. 1100, U. S. C., Title 47, Sec. 501) 20

Argued by
MR. THOMAS O'ROURKE GALLAGHER

Supreme Court of the United States

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The opinion rendered by the United States Circuit Court of Appeals, Second Circuit, will be found annexed to the transcript of the record (R. 327). It is reported in 90 Fed. (2d) 630.

No opinion was rendered by the United States District Court, for the Southern District of New York.

Jurisdiction

The statutory provisions under which the jurisdiction of this Court is invoked, is Section 240 (A) of the Judicial Code, as amended by the Act of February 13th, 1925, and the Act of March 8th, 1934.

Writ of Certiorari was granted in this case, October 11th, 1937.

Statement of Case

The defendants were convicted of smuggling into the Port of New York, 1,800 cases of alcohol, on March 17th, 1936, in violation of Title 19, United States Code, Section 1593A on the first count of an indictment; with having possessed and concealed same thereafter, in violation of Title 19, United States Code, Section 1593B, on the second count, and with having conspired together and with others to do these acts, in violation of Title 18, United States Code, Section 88, on the third count.

The alleged conspiracy as charged in the indictment, covered a period of time from the 15th day of October, 1935, to the date of the filing of the indictment, to wit, May 15th, 1936.

The Government, in order to prove its case, by its agents, testified that over this period of time Federal agents had the defendants under observation, and had tapped numerous telephone wires, and had listened in to over five hundred telephone calls between the various parties, and others.

Of these, the prosecuting attorney selected 72 messages for introduction into evidence, and over strenuous objection, timely made and persisted in throughout the trial, Federal agents were permitted to testify to the contents of said telephone messages.

It was conceded by the Circuit Court, that many of these messages were interstate in character (90 Fed. [2d] 630 at p. 632, R. 331).

A further point is urged by the defendant-appellant, Nardone, as same concerns him alone, to wit, that a certain telephone message, intercepted as were the others, alleged to have been between him and an unknown person called "Eddie", having absolutely nothing to do with this case, and being solely with reference to some State law violation by others, was introduced into evidence over objection, and motion for a mis-trial denied (R. 160).

It is further respectfully urged that this Court review all of the evidence, as defendant-appellant, Nardone, claims that there was absolutely no evidence offered showing any overt act or participation on his part in any conspiracy, or other crime.

Statement of Assigned Errors Presented to This Court

It was error for the trial court to permit the introduction into evidence of the contents of intercepted telephone messages, obtained by Federal agents tapping the wires, in violation of Title 47, U. S. C. A., Section 605 (R. 58, 131 and 139). It was error to receive in evidence, copies of telegrams and telegraph money orders, obtained in violation of this same statute (R. 57, 61 and 64).

It was error for the trial court to permit testimony of a conversation over the telephone (obtained by tapping the wires as aforesaid), between the defendant-appellant Nardone, and some other unknown person, the contents of which had absolutely no reference to the case on trial or connection with same, and which conversation was prejudicial to this defendant-appellant, on the trial (R. 160).

It was error for the trial court to refuse to grant the motion of defendant-appellant Nardone, to dismiss at the close of the case (R. 244, 246 and 275).

ARGUMENT

I

Title 47, U. S. C. A., Section 605, prohibits the interception and/or the divulging or publication of the contents of any such intercepted communication.

The most concise statement supporting this point, is contained in the memorandum written by Associate Justice BENJAMIN N. CARDOZO, in granting the application for a stay, pending this appeal, on June 26th, 1937.

Judge CARDOZO said:

> "The present Statute (Act of June 19, 1934, C. 652, §605, 48 Stat. 1103; 47 U. S. C. A., §605) makes it unlawful for anyone unless authorized by the sender, to intercept a wire or radio message. It does not stop there. It says that the message, if intercepted, shall not be divulged or published. I think the question should be considered by the court whether this is not a prohibition against divulging the message anywhere, even on the witness stand, and hence a prohibition against receiving it in evidence. No such statute was before the court in Olmstead v. United States, 277 U. S. 438. The tenor of the Washington Act considered in that case was altogether different." (Not in printed record; filed with Clerk of this court.)

After submitting this opinion to the court, appellant feels there is very little that he can add, and hesitates in going further.

With due deference to Judge CARDOZO, and not with any intention of adding to this opinion, but simply to elaborate on same, appellant respectfully submits:

The Olmstead (*supra*) appeal, was based on a violation of the 4th and 5th Amendments of the Constitution, and was rendered June 4, 1928, six years prior to the Federal Communications Act of June 19, 1934.

In the Olmstead case, a government officer tapped a wire in violation of a state statute. In the case on appeal, government agents admitted tapping wires and listening to communications, without the consent of the "senders", in violation of this federal statute.

Congress in enacting Title 47, U. S. C. A., Section 604, used clear and unmistakable language. It expressly forbade *any person* from intercepting *any* communication and divulging or publishing the contents to *any person.*

This is an all embracing statute; there is no limitation or exception made in the law.

Had Congress desired to make an exception in the prosecution of criminal cases, it would have been a simple matter for Congress to so state, in writing the law.

Congress did not see fit, and Congress did not make any exception.

The statute itself is explicit.

Congress even went further than this, and it not alone prohibited the interception and publication of communications, but also made it a criminal offense to do so.

Title 47, U. S. C. A., Section 501, specifically prescribes that a violation shall be punishable by a fine of not more than $10,000.00, or by imprisonment for a term of not more than two years, or both.

Excerpts from the Opinion of the Circuit Court

> "It appeared that for some time before the defendants were arrested they had been under the observation of Federal agents and that about five hundred of their telephone calls had been made while Government agents were listening in and taking notes in so far as possible of what was said. Of these the prosecuting attorney selected 72 messages for introduction into evidence. They had a vital part in the Government's proof and if they were erroneously admitted reversal must follow without question" (R. 329).

History of the Act

Comparatively from the time the Federal Post Office started to function, private correspondence was considered sacred.

As the years went by and the telegraph and telephone were invented, neither of these being operated by the Government, but by private companies, legislation was enacted in the various states, and in a number of states, laws were passed, making it a crime to tap telephone wires.

In the editor's notes in the Olmstead (*supra*) case, a list of statutes is compiled, showing that laws had been passed, making it a criminal offense to intercept a message or divulge the contents of same in a total of 39 states of the Union (72 Law Ed. p. 957).

Very properly, Chief Justice TAFT, in the Olmstead (*supra*) case, decided that no State could, by its legislation, limit or prescribe the rules of evidence applicable in Courts of the United States.

Later, radio was invented, and it being interstate, without question, in its scope, a Federal commission was created to supervise.

This Commission had absolutely *nothing to do with telephone or telegraph* companies.

Section 4 of the Act of August 13th, 1912 (c. 287; 37 Stat. 304), prohibited any person from divulging or publishing the contents of any message, transmitted or received by radio station, except "to a person or persons to whom the same may be directed or their authorized agent or another station * * * unless legally required so to do by the court of competent jurisdiction or other competent *authority*", *and also provided* a penalty for a violation of this section.

Zoline's Federal Criminal Law and Procedure, Volume 2, page 482, Section 1199.

The Act of October 29th, 1918, C. 197, 40 Stat. at L. 1017, made the same provision during governmental operation of the telephone.

The Radio Act of February 23rd, 1927, Chapter 169, Sec. 27, 44 Stat. at L. 1162, 1172, U. S. C. Appx., Title 47, Secs. 63-39 (*Mason's*) contained the same provision, relative to radio messages, with no exception.

Subsequent thereto, and *after* the Olmstead (*supra*) decision, the Federal Communications Commission Act came into existence, and the Federal Radio Commission was merged into same (June 19, 1934).

Prior to the enactment of this act, the prohibition was against the unauthorized publication of *radio* communications (except in 1918 during the governmental operation of the telephone as a war time measure), and by this Act, the prohibition was extended to the telephone and telegraph.

In submitting its report on the bill, the Senate Committee on Interstate Commerce said:

> "Section 605 prohibiting unauthorized publication of communications, is based upon Section 27 of the Radio Act and extends it to wire communications. S. Rep. No. 781, 73d Cong. 2d Sess. p. 11, Con. Doc. 9770."

The Beard Case Is Not Controlling

In the case of *Beard* v. *U. S.*, 82 Fed. (2d) 837 (App. D. C.), Associate Justice GRONER, writing the opinion, stated the evidence was offered solely to prove that the place was a gambling place.

Reviewing the question, he said:

> "The case therefore is not one in which evidence of a telephone conversation is introduced against a particular person."

The Smith Case

In the case of *Albert H. Smith et al.* v. *United States*, decided by the same court, *United States Court of Appeals* for the District of Columbia, No. 6662, May 24th, 1937 (not reported), the court simply followed the Olmstead (*supra*) case, and rendered its opinion on that authority, without comment.

The Hearst Case

In the case of *Hearst* v. *Black*, decided by the same court (United States Court of Appeals for the District of Columbia), Case No. 6808, on November 9th, 1936 (not reported), Associate Justice GRONER, who also wrote the decision, in the Beard (*supra*), case, apparently was of a different opinion.

With reference to Section 605, Justice GRONER said in part:

> "The property rights in private telegrams is in no material respect different from the property right in letters" (*etc.*).

This case had to do with subpoenae *duces tecum* issued by the Senate Committee on the telegraph companies doing business in the City of Washington, for the delivery to the committee of all telegraph messages in the possession of said company.

Judge GRONER cited the Act, more particularly Section 605, and further stated:

> "The property rights in private telegrams is in no material respect different from the property right in letters and other writings; nor is there any good reason why the right of privacy in the one should be any greater than in the other. * * *
>
> "*In principle*, therefore, we think that a dragnet seizure of private telegraph messages as is alleged in the bill, whether made by persons professing to act *under color of authority from the government* or by persons acting as individuals, is a trespass which a court of equity has power to enjoin."

The communications companies are under a contract of duty not to disclose the contents of plaintiff's messages, except in compliance with due demand, and in accordance with due process of law.

The inviolate nature of telegraphic messages has long been up-held in Federal Courts.

Jones, Telegraph and Telephone Companies, Sec. 305 (1906);
Gray on Communications, etc., Sec. 25 (1885).

We respectfully submit that all of the foregoing applies with equal force to telephone messages.

Circuit Court Judge CHASE, writing the opinion in the case on appeal stated, with reference to the admissibility of evidence obtained by means of wiring tapping, that the Court was "bound to enforce the law as declared in the above (Olmstead) case", and found under this authority, that the evidence was admissible (R. 331).

He further stated however:

> "That would dispose of the point flatly were it a state rather than a federal law which forbade the interception of these messages. Yet in principle there is no distinction. Since there is no constitutional prohibition of their admission in evidence, it is necessary to their exclusion that some statute must so provide. Evidently Congress did not care for such a policy. As Chief Justice TAFT said: 'A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore.' Olmstead v. United States, *supra*" (R. 331).

The decision in the Olmstead case was by a divided bench, Associate Justices HOLMES, BRANDEIS, BUTLER and STONE dissenting, all writing dissenting opinions.

The Court was then dealing with niceties of conduct. Today this court is dealing with a clear and *premeditated violation of a Federal Statute.*

Even dealing with "nice ethical conduct by Government officials" (the characterization used by Chief Justice TAFT in the Olmstead [*supra*] case), when there was no Federal Communications Act in existence to prohibit same, and to emphasize the need for such an Act, which is now upon our statute books, may we respectfully quote from the dissenting opinions of the Learned Justices in the Olmstead (*supra*), case.

Quoting from the opinion of Mr. Justice HOLMES:

> "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part" (p. 470).

Mr. Justice BRANDEIS said in part:

> "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. * * * Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call [illegible] may call him. As a means of espionage, writs of assistants and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping" (pp. 475 and 476) * * *.
>
> "It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rules. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding" (p. 479) * * *.

"* * * As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law" (p. 482).

(Pleader—in this case now a Federal law.)

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. * * * To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face" (p. 485).

Your pleader could go on at great length in an endeavor to convince this Learned Court of the wrong that would be done to society at large, by permitting, encouraging and approving of the violation of law by Government officials, to seek evidence, but knows that his ability is limited and that it is a physical impossibility for him to even try to improve upon the terrific denunciations of such practice as set forth in the dissenting opinions in the Olmstead case.

It is sufficient to state, that although this was the minority opinion of the court at that time, subsequent thereto the Federal Communications Act was made the law of the land, and your pleader respectfully submits and feels that the minority opinions so written, together with this Act, now on our statute books, is ample justification to sustain the contention set forth in this brief.

It will also be noted that many of the telephone messages intercepted were conversations between parties who were not on trial, and some between parties not even named as defendants.

The record shows (R. 142 to 160) many of such messages between the defendant, Frank Carmine Nardone and his sister, Caroline, and with others, introduced into evidence, but which had absolutely nothing to do with the case on trial.

This is also true, of practically all of the messages reported, commencing at pages 174 to 181 of the Record.

Objection was made to these, not only on the original ground, but on the further ground that there was nothing in the messages that connected this defendant with any act charged in the indictment.

Then the following took place:

"The Court: Is there anything in the conversations saying anything about the source of it, in these conversations?

"Mr. Halle: Nothing.

"Mr. Dunigan: Nothing heretofore.

"The Court: Will there be other conversations?

"Mr. Dunigan: Yes, I will have another man on the stand to testify to numerous conversations.

"The Court: I think for the present I will take it if you can connect it. If not, it will go out" (p. 166, fol. 224).

The messages heretofore read, and more particularly the messages between defendant, Nardone, and his sister, Caroline, and others, not named as defendants or conspirators, were not connected.

A motion was later made by the attorney for Nardone, to strike out these said messages, and the court reserved decision (R. 186).

Motion was again renewed (R. 242) and at this time denied, to which exception was taken.

Telegrams

The trial court also admitted in evidence, in violation of this Act (Title 47, U. S. C. A., Section 605) and over objection timely made, numerous telegrams and telegraph money orders (R. 56 and 61).

None of these telegrams or money orders admitted, were sent by this appellant. They were not connected up with him, and many were sent by parties not on trial, or named as defendants.

Only a few need be referred to here, as all were inadmissible under the Act. Page 66 of the Record shows admission into evidence of Exhibit Number 6. The index describes this as a telegram to Conrad, unsigned (R. 325). There is no Conrad mentioned, either as a defendant or conspirator.

Telegraph money orders sent by Bishop to Baker, Exhibit 31 (Admitted R. 62), and Marchand to Miller, Exhibit 20 (R. 63) were between parties not named as defendants or conspirators.

In *"Cooley's Constitutional Limitations", 8th Ed. (1927)* Volume 1, on page 625, and following, the author entered into a long dissertation, showing that the reasoning of Chief Justice TAFT was in error. The author's arguments closely follow the line of reasoning in the dissenting opinions in the Olmstead case.

> "1. The statutes which forbid those intrusted with them from disclosing telegraphic communications are not restricted in their force to the imposition of penalties for disobedience, but they announce and establish a principle of public policy which is violated as distinctly as when a telegram is brought into court for public exposure as when it is privately shown to persons having no right to it. The disclosure contravening and tending to defeat the policy of the law cannot be legalized by any judicial command or license. * * *"

II

The admission of a telephone conversation relative to acts of violence not connected with the issues, was prejudicial and was grounds for a mis-trial, as far as the defendant Nardone was concerned.

The Government had called John Picarelli, an investigator of the Alcohol Tax Unit, as a witness (R. 130). His record of tapped telephone messages was bulked and classified as Exhibit 66 (R. 138).

Over strenuous objection, the court directed that this record be offered in evidence (R. 139).

After several messages were read by him, which were of no consequence, a message, dated February 25th, 1936, was read, and the entire conversation heard by the jury.

This message was presumed to be between the defendant Nardone, and an unidentified person called "Eddie". Said "Eddie" was alleged to have told Nardone about some State indictment against three other persons, not connected [illegible] whom was killed, and a question of money was brought up with reference, apparently, to their defense (R. 160).

The Government positively knew what was in this message, before it was read; knew that it had absolutely nothing to do with this case; knew that it was prejudicial to Nardone, and deliberately offered it in evidence.

> "Mr. Dunigan: No. 231 out of these 504 which the witness on the stand now would testify to. I have selected 72 out of 504. 700 wire taps were made" (R. 138).

Mr. Dunigan was the Assistant United States Attorney trying this case, and in this statement deliberately stated that he had selected this message, and had given it to the

witness to read, and at that time he knew full well it had nothing whatever to do with this case.

> "The Court (referring to above message): * * * How important are these conversations, about what happened, to the Government?
>
> "Mr. Dunigan: This particular one?
>
> "The Court: Yes.
>
> "Mr. Dunigan: I cannot attach any importance to that. I do not know what they mean when they say 'up above'" (R. 168).

As soon as this message was read (and counsel did not and could not know the contents of it, until it was read) counsel for the defendant Nardone, strenuously objected to same, and moved for a mis-trial (R. 161).

Motion for a mis-trial was denied, to which exception was taken, and the court then endeavored to cure the wrong by directing the jury to disregard the contents of the message.

However, the Court's direction was an absolute nullity.

> "The Court: February 25th, 1936, is stricken out. Gentlemen, do not consider it in any way at all, but take it out of your mind. That applies to any testimony stricken out during the trial" (R. 172).

The Government had offered 504 messages and had selected 72 out of the 504 to be read.

Many of the messages had been read, and the jury could not tell what the court meant, and to what message the court referred, in the above instructions, as there were other messages on February 25 (R. 172), later offered in bulk.

The Circuit Court of Appeals considered this message of vital importance, and the error a serious one. In the opinion rendered, considerable attention was given to this particular message.

Instead of incorporating the entire opinion in this brief, your pleader begs permission to point out the salient com-

ments of the Circuit Court of Appeals with reference to same.

> "Defendant Nardone's attorney expressed doubt as to the effectiveness of that" (striking out the evidence) "and insisting that the error could not be cured, declined the offer of the court to read just what was being struck out and stood upon his motion for a mistrial. * * * If incurable error was committed in reading this message to the jury, it is obvious that no harm was done any defendant but Nardone. The harm, if any, to him consisted in the showing of his interest in and willingness to help some unknown persons who had been indicted in a state court. The vice lay mainly in the guarded language used, * * *. *The general atmosphere of wrong doing hurt here* if anything about the message did. Then, too, *it is impossible to excuse the reading of a message which by its terms referred only to the claimed infraction of some state law having apparently nothing to do with the subject matter of the indictment on trial.*" (Italics ours.) (R. 330.)

The Appellate Court then continued to say that it thought the harm was so general and vague, that "we are not prepared to say that it was not cured by the prompt action of the court", and further that "the charges against Nardone in the indictment in this case were by competent evidence so clearly shown that a reversal on this point would be a plain miscarriage of justice" (R. 330).

The charges against Nardone in the indictment were not clearly shown by competent evidence.

As a matter of fact, there was no evidence against the defendant Nardone, that he had committed any overt act or participated in any of the acts charged in the indictment.

This was without question, a message offered to prejudice the jury against Nardone, constituted reversible error, and motion for mistrial should have been granted.

Marsh v. *U. S.*, 82 Fed. (2d) 703;
Leroy v. *Gov't of Canal Zone*, 81 F. (2d) 914;
Smith v. *U. S.* (*supra*).

"We think that these instructions failed to cure the error committed by the court in admitting the statements to be read to the jury as evidence in the case. The statements bore absolutely no relevancy to the issue made by the indictment and *tended only to confuse the jurors and lead them to associate the appellants with the murder."* Smith v. U. S. (*supra*).

III

The trial court erred in refusing to grant motion to dismiss indictment as against the defendant Nardone.

Ordinarily, this point would not be considered by this court. However, as the Circuit Court based its ruling, with reference to the foregoing message on their opinion "that the charges against Nardone in the indictment in this case were by competent evidence so clearly shown that a reversal on this point would be a plain miscarriage of justice" (R. 330), defendant-appellant Nardone, respectfully prays this court to scrutinize the evidence, if any, contained in the entire case, against the defendant, Nardone.

There was absolutely no evidence offered during the entire trial that the defendant Nardone, had done one single thing looking towards a consummation of the alleged conspiracy.

Nardone, without question, knew some of those mentioned as conspirators, and was seen at various times and in various places in their company, but that is as far as the proof went.

> "Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction." (Citing many cases.)
>
> *Paul* v. *U. S.*, 79 Fed. (2d) 561.

"Mere knowledge of an unlawful conspiracy is not sufficient to make one a member thereof, but he must actively participate therein, before he is liable as a member. Young, et al. v. U. S. (C. C. A.), 48 Fed. (2d) 26; Thomas v. U. S. (C. C. A.), 57 F. (2d) 1039."

Zito v. *U. S.*, 64 F. (2d) 772;
Niccola v. *U. S.*, 72 F. (2d) 780;
U. S. v. *Buchalter and Shapiro* (C. C. A.), 2nd Circuit, March 8th, 1937;
Oras v. *U. S.*, 67 F. (2d) 463;
Dale v. *U. S.*, 66 Fed. (2d) 666;
U. S. v. *McClarty*, 191 F. 518;
Parnell v. *U. S.*, 64 F. (2d) 324.

In all of the foregoing cases, the courts have universally held that mere inactivity or even knowledge of a conspiracy without any overt act is not sufficient to convict defendant of being a part of the conspiracy.

It is possible and even probable that Nardone knew what some of these men were doing.

There is no proof that he did anything, except to associate with some of them at various times.

IV

Wherefore, it is respectfully submitted that under the foregoing, judgment of conviction entered herein should be reversed, so far as same affects the defendant Nardone, the indictment dismissed and defendant discharged.

Respectfully submitted,

THOMAS O'ROURKE GALLAGHER,
Attorney for Defendant-Appellant,
Frank Carmine Nardone.

APPENDIX

Statute Involved

Communications Act of 1934

Section 605 of the Federal Communications Commission Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605), the part of which is here material being italicized, is as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and *no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not en-

titled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. [Italics ours.]

Section 501, the penal section of the statute, provides (48 Stat. 1100, U. S. C., Title 47, Sec. 501):

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.